

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1172

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

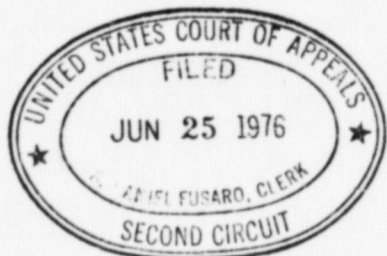
BERNARD TURNER,

Defendant-Appellant.

Docket No. 76-1172

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



DAVID J. GOTTLIEB,
Of Counsel.

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
BERNARD TURNER
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PAGINATION AS IN ORIGINAL COPY

U.S. DISTRICT COURT — CRIMINAL DOCKET

Felony ☒ JUDGE/Assigned Trial
 Offense ☐ ~~WARRANT~~ 0839 • U. S. vs.
 Hearing ☐ 208 1 District Office

TURNER, BERNARD

Case Filed
 Day | Mo. | Yr. | Docket No. | Det.
 23 | 12 | 75 | 1253 | 01
 No. of 01
 Defendants

ARGES
 U.S. CODE SECTION
 18:2113(a)

DEFENSES
 Bank robbery by force, violence and intimidation.

COUNTS
 1

MAGS.
 CASE NO.

BAIL & RELEASE
☐ Denied ☒ Personal Recog.
☐ AMT. Conditional Release ☐ Unsecured Bond
 Set (1000) \$ 10 ☐ 10% Deposit
☐ date ☐ Surety Bond
☐ Bail Not Made ☐ Collateral
☐ Bail Status Changed ☐ 3rd Party Custody
 (See Docket) ☐ PSA

U.S. Attorney or Asst.

Allen R. Bentley, AUSA
 212-791-1957

Defenses: Guilty, Plea, Waived, Set, None ☒ Other, PD, CC
 Roland Thau, Esq.
 Legal Aid- 577-3415

ARREST

INDICTMENT ☒

ARRAIGNMENT

TRIAL

SENTENCE

U.S. Custody or
 Based on Above
 Charges

☐ High Risk
 Defn. &
 Date Design'd

12-23-75

12-29-75

Trial Set For

Voir Dire

Disposition

☐ Prosecution Deferred

Waived ☐

Superseding
☐ Indict/Info

1st Plea

12-29-75

☒ Not Guilty

☐ Not Guilty

☐ Not Guilty

☐ Not Guilty

☐ Guilty

Trial Begun

☐ Trial Begun

☐ Trial Begun

☐ Trial Begun

☐ Trial Begun

☐ Convicted

☐ Acquitted

☐ Dismissed

☐ Not Guilty

☐ Not Guilty

☐ On All Charges

☐ On Lesser Offense

☐ WOP: ☐ WOP

☐ Not Guilty/Discontinued

☐ Not Guilty/Discontinued

Search
 Warrant

Issued

DATE

INITIAL/No.

INITIAL
 APPEARANCE

12-29-75

INITIAL/No.
 CJH 080G

OUTCOME

Return

PRELIMINARY
 EXAMINATION
 OR REMOVAL
 HEARING

Date

Scheduled

Date

Held

☐ Waived

☒ Not Waived

☐ Intervening
 Indictment

☐ Dismissed

☐ Held for
 District G.I

☐ Held to Answer to U. S. District Court

AT:

Magistrate's Initials

BOND

☐ Exonerated

☐ To Transfer District

COMPLAINT

12-19-75 CJH-080G

Tape No.

INITIAL/No.

OFFENSE
 (In Complaint)

18 USC 2113(a)-Bank Robbery

*Show last names and suffix numbers of other defendants on same indictment/information

DATE	PROCEEDINGS	V. Excludable Delay			
		(a)	(b)	(c)	(d)
12-23-75	Filed indictment.				
12-29-75	Deft. present (Atty. present) pleads not guilty. Bail at \$10,000 cash or surety continued. Assigned to Bonsal, J. for all purposes..Frankel, J.				
01-14-76	Filed documents forwarded by Magistrate Hartenstein: docketsheet, complaint, CJA 23 financial affdvt., order appointing counsel-Fed. Defender Services Unit.				
02-18-76	Jury empanelled. Trial begun. Both sides rest. Summations by counsel. Charge by court...Marshals sworn. Jury verdict. Deft. guilty. Pre-sentence report ordered. Apr. 5, 1976 set for sentence. Bonsal, J.				
04-05-76	Filed Judgment (atty. Roland Thau present) 8 yrs. impr. 18:4208(a)(1) at the expiration of 3 yrs. of confinement. Deft. to receive credit for time served. Court recommends that the deft. receive appropriate drug and psychiatric treatment. Bail pending appeal fixed in the amount of \$10,000. Bonsal, J. issued all copies.				
04-06-76	Filed notice of appeal from judgment of 4-5-76. Leave to appeal in forma pauperis is granted. Bonsal, J. issued all copies.				

Clerk
 Deputy Clerk

ARB:emw
d-635

75 CRIM. 1253

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :

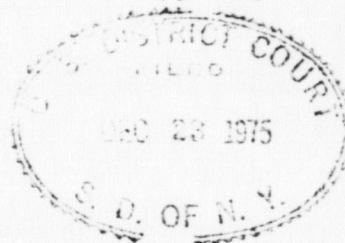
-v- :

BERNARD TURNER, :

Defendant. :

INDICTMENT

75 Cr.



-----X
The Grand Jury charges:

On or about the 18th day of December, 1975, in the Southern District of New York, BERNARD TURNER, the defendant, unlawfully, wilfully and knowingly did, by force and violence and by intimidation, attempt to take from the person and presence of another property and money belonging to, and in the care, custody, control, management and possession of the Bowery Savings Bank, One Penn Plaza, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Section 2113(a).)

Spinald C. Burns Jr.
FOREMAN

Thomas J. Cahill
THOMAS J. CAHILL
United States Attorney

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

BERNARD TURNER,

Defendant.

INDICTMENT

75 Cr.

(18 U.S.C. § 2113(a).)

THOMAS J. CAHILL

United States Attorney.

A TRUE BILL

Donald C. Bane, Jr.
Foreman.

FILED

DEC 23 1975

S. D. OF N. Y.

12/23/75 - filed indictment. *proff.*

12/29/75 - Dept (Atty: Roland Thau)

pleads NOT GUILTY. Bail (\$1000. each)

Surety continued, assigned Bond
for all purposes. *We J Handell*

FEB 18 1976

Jury empanelled, Trial set for
March 10th 1976. Summary judgment
granted by Court. Plaintiff's motion
for summary judgment denied. Plaintiff's
motion for summary judgment denied.
Jury verdict guilty. Plaintiff's motion
for summary judgment denied.
Jury verdict guilty. Plaintiff's motion
for summary judgment denied.

APR 5 1976

Bernard Turner, Defendant, Trial set for
April 10th 1976. Plaintiff's motion
for summary judgment denied. Plaintiff's
motion for summary judgment denied.
Jury verdict guilty. Plaintiff's motion
for summary judgment denied. Plaintiff's
motion for summary judgment denied.
Jury verdict guilty. Plaintiff's motion
for summary judgment denied. Plaintiff's
motion for summary judgment denied.

(In open court; jury present)

Charge
US v. Turner
75 Cr.1253
2/18/76

CHARGE OF THE COURT

Bonsal, J.

THE COURT: Madam Forelady, as you are, Miss Price, since you are occupying the first chair, and ladies and gentlemen of the jury:

First, I would like to thank each of you for the care and attention you have shown throughout this short trial, and I tell you that I appreciate the sacrifices I know each of you has been called upon to make in your own personal lives so that you can serve in this very important capacity of being on a federal jury.

I am sure that you will bear with me and give me that same degree of care that you have shown throughout so that you may understand the principles of law which apply to this case.

As I mentioned to you this morning when you were selected, it is your duty here to weigh the evidence calmly and dispassionately, without any

sympathy, without any prejudice for or against either the Government or the defendant.

I told you this morning that everyone appearing before this bar of justice is entitled to an absolutely fair and impartial trial, regardless of his station in life, and your verdict here must be based solely on the testimony which you have heard from that witness stand and any exhibits which were received in evidence and on nothing else at all.

I also told you this morning it was my duty to instruct you as to the law, and as to the law you must accept my instructions, but, on the other hand, you, the jury, are the sole judges of the facts, not what a lawyer says a witness testified to or what a document contains or shows or what I might say on the subject, but you, the jury, remember and decide.

I also told you this morning that during the trial I would have conversations with one or other of the lawyers, and indeed I did. I told you then, and I repeat now, pay no attention to any of these conversations. And, above all, draw no inference from anything that I have said during this trial that might lead you to believe I favor one side or the other here, because, of course, I do not. That is not my prerogative; that is yours.

1 qwmch

2 Now, throughout this charge I will instruct
3 you that you may not convict this defendant, Mr. Turner,
4 unless and until you are satisfied that the Government has
5 proven each element comprising the crime charged beyond
6 a reasonable doubt.

7 What do we mean by "beyond a reasonable doubt"?
8 The words suggest the answer. It is a doubt based on
9 reason. It is a doubt which a reasonable man or woman
10 would entertain. But a reasonable doubt is not a fanciful
11 doubt. It is not an imagined doubt. It is not a doubt
12 that a juror might conjure up in order to avoid performing
13 an unpleasant task. It is a reasonable doubt. It is a
14 doubt which arises in a juror's mind because of something
15 in the evidence in the case or the absence of evidence
16 in the case. It is the kind of doubt which would cause
17 a reasonable man or woman in a more serious and important
18 matter in his or her life to hesitate to act. And the burden
19 is on the Government to prove the guilt of the defendant
20 beyond a reasonable doubt.

21 Now, the Government need not prove guilt beyond
22 all possible doubt. If that were the rule, few people,
23 however guilty they might be, would ever be convicted.
24 In this world of ours, it is practically impossible for
25 one to be absolutely and completely convinced of any

2 controverted fact which, by its nature, is not susceptible
3 to mathematical precision or to mathematical certainty.
4 So the law is that the Government must prove the guilt of
5 the defendant beyond a reasonable doubt, not beyond all
6 possible doubt.

7 Now, when I review the indictment with you,
8 ladies and gentlemen, I will remind you, as I did this
9 morning, that the indictment is merely the charge, the way
10 the Government brings into court individuals who it claims
11 have violated the law. I told you that the indictment is
12 not evidence of the guilt of the defendant, and the
13 indictment is not to detract in any degree from the
14 presumption of innocence with which the law surrounds this
15 defendant until his guilt is proven, and this presumption
16 of innocence remains with the defendant, Mr. Turner,
17 throughout the trial and applies to the consideration of
18 each of the essential elements of the crime charged,
19 and this presumption of innocence remains unless and until
20 the jury finds that the defendant is guilty beyond a
21 reasonable doubt.

22 Now, the defendant has pled not guilty here
23 and by doing that he has put in issue every material
24 element in the indictment, and this burden has remained
25 on the Government throughout, and if the Government has not

proved to you that the defendant is guilty beyond a reasonable doubt, then, of course, it is your duty to find the defendant not guilty.

Now, the evidence has been marshaled for you by the lawyers a few minutes ago. I don't intend to repeat all that because, in any event, it is your recollection and not mine that controls.

Briefly, as I understand the contentions here, the Government contends that the defendant, Mr. Bernard Turner, on December 18, 1975, around 2:30 in the afternoon, entered the concourse level of the Bowery Savings Bank at 34th Street and Seventh Avenue and attempted to take money belonging to the Bowery Savings Bank by intimidation, and I will tell you about that later.

The Government contends that the defendant approached one of the bank tellers, Miss Martinkovic, who testified this morning, and said some words to her, and I don't need to repeat them. You will remember them. And the Government contends that this was for the purpose of obtaining money from the bank.

Now, the defendant denies the Government's contentions here, denies that he attempted to take money from the Bowery Savings Bank through the use of either force, violence or intimidation.

2 Now, as to the statute which is involved here,
3 ladies and gentlemen, Section 2113(a) of Title 18 of the
4 United States Code provides in relevant part that:

5 "Whoever by force and violence or by intimid-
6 idation" -- I don't remember any force or violence here.
7 The Government, I think, is relying on intimidation,
8 and I will tell you about that -- "attempts to take from
9 the person or presence of another any property or money
10 or any other thing of value belonging to or in the care,
11 custody, control, management or possession of any bank" --
12 in this case we have the Bowery Savings Bank -- "any bank
13 the deposits of which are insured by the Federal Deposit
14 Insurance Corporation is guilty of a crime."

15 That is the statute, attempted robbery of a
16 bank.

17 Then the indictment, ladies and gentlemen, and
18 I will read it to you, and, mind you again, it is purely a
19 charge:

20 "The grand jury charges that on or about the
21 18th day of December, 1975, in the Southern District of
22 New York" -- and this office of the Bowery Savings Bank
23 is in the Southern District of New York -- "Bernard Turner,
24 the defendant, unlawfully, wilfully and knowingly did,
25 by force and violence and by intimidation, attempt to take

2 from the person and presence of another property and
3 money belonging to and in the care, custody, control,
4 management and possession of the Bowery Savings Bank,
5 One Penn Plaza, New York, New York, a bank the deposits
6 of which were then insured by the Federal Deposit Insurance
7 Corporation."

8 In order to find Mr. Turner guilty under the
9 indictment and the statute which I read to you just now,
10 the Government must prove each of the following elements
11 and must prove them beyond a reasonable doubt:

12 1. That on or about December 18, 1975, the
13 Bowery Savings Bank was a bank whose deposits were
14 insured by the Federal Deposit Insurance Corporation.

15 You remember the lawyers stipulated that
16 in fact those deposits are insured, so you don't have to
17 worry about that. Everybody agreed with that.

18 2. That on or about December 18, 1975, the
19 defendant attempted to take money from the bank which was
20 in the care of the bank; attempted to take money from the
21 bank.

22 3. That the attempt to take money was from the
23 person or presence of one or more persons other than the
24 defendant.

25 And here, as I recall the evidence, I am not

sure there is a dispute here, the Government contends the attempt was to take money from Miss Martinkovic, the teller at the bank, who testified before you this morning.

The fourth element the Government must prove beyond a reasonable doubt is that the defendant attempted to accomplish this bank robbery by force, violence or intimidation.

I say again I don't remember any force or violence. This is "or." The Government's theory is it was done by intimidation.

NOW, you will ask me, "What is intimidation?"

Intimidation is merely a form of a threat to instill fear in somebody else. So, here the Government contends, and the defendant denies, that the defendant instilled fear in this teller, Miss Martinkovic, by making the statement to her to the effect, as I recall it, that "I have a gun and I don't care, it will be your fault if anybody gets hurt," something along that line, "Put your money in a bag."

As I recall, those are the words, but, of course, it is your recollection that controls.

The Government contends, and the defendant denies, that this statement that was made to the teller instilled fear in her and led her to put the money in the

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2 envelope.

3 In considering whether Miss Martinkovic was
4 intimidated here, ladies and gentlemen, draw on your own
5 knowledge and your own experience. Would you feel threatened
6 under those circumstances? Would you feel afraid if you
7 didn't comply with the request that was made? That is
8 really the test here.

9 Finally, the final element which the Government
10 must prove beyond a reasonable doubt is was the defendant
11 here, Mr. Turner, acting knowingly, wilfully, unlawfully,
12 in other words, that he had the criminal intent here to
13 attempt to rob the bank.

14 How do you determine this knowledge? How do
15 you determine whether he was acting knowingly, wilfully,
16 unlawfully?

17 Well, an act is done wilfully and knowingly
18 if it is done voluntarily, purposely.

19 An act is done wilfully, knowingly and
20 unlawfully if it is done with an evil motive or purpose,
21 such as to rob a bank or attempt to rob a bank.

22 But an act is not done wilfully, knowingly
23 and unlawfully if it is done by mistake or by carelessness
24 or for some other innocent reason.

25 Obviously, we can't prove exactly what the

2 defendant had in mind, because we cannot look into his
3 mind to see what knowledge he had, but these are matters
4 which you, the jury, will determine from a careful
5 consideration of the facts and circumstances which were
6 brought out during the trial.

7 The knowledge and intention as to wilfulness
8 of a defendant may only be understood if put in the context
9 of the circumstances surrounding his act, and the inferences
10 that you, the jury, find may be reasonably drawn therefrom.
11 You might ask yourselves, was this normal or abnormal, what
12 he was doing here; whether you think the background of
13 the defendant made it likely or unlikely that he understood
14 what he was doing; whether you think the defendant had a
15 motive in doing what he did; whether you think he had a
16 financial or other interest in the outcome.

17 These are the kinds of questions, ladies and
18 gentlemen -- of course, not the only ones -- that you should
19 ask yourselves in order to determine the knowledge and
20 intentions of this defendant.

21 Of course, I don't suggest any answers to any
22 of these questions because, after all, in your own daily
23 affairs, ladies and gentlemen, you are continually called
24 upon to use your own common sense and experience to
25 determine from the actions and statements of others

2 their real intentions and purposes are. And please do
3 the same thing here.

4 In considering the evidence you have heard,
5 ladies and gentlemen, remember that the law recognizes
6 two types of evidence: direct evidence and circumstantial
7 evidence.

8 Direct evidence is the testimony of a witness
9 who tells you what he did, what he saw.

10 Circumstantial evidence consists of circumstances
11 by which the jury may infer by a process of reasoning
12 certain facts which are sought to be established as true.

13 The classic example of circumstantial evidence
14 is, if you go home tonight, and you walk into your apartment,
15 and somebody is there looking at television, and looks
16 at your hat and coat and sees they are wet, they may say,
17 "Oh, it's raining outside." They haven't looked outside
18 to see if it is raining; they have looked at you. But,
19 by a process of reasoning, they conclude it is raining.
20 That is circumstantial evidence.

21 Consider that in this case as well.

22 Both direct evidence and circumstantial evidence
23 are good evidence, and no greater degree of certainty is
24 required when it is circumstantial than when it is direct,
25 for in either case the Government must prove the guilt of

2 the defendant beyond a reasonable doubt.

3 And different inferences may be drawn whether
4 the evidence is direct or circumstantial. And it is for
5 you, the jury, alone to decide what inferences you will
6 draw from the evidence and what facts you find to have been
7 proved.

8 You, the jury, of course are the sole judges
9 of the credibility of the witnesses who testified before
10 you today, and you inspect the testimony of all the
11 witnesses with the same standards. It is the quality of
12 the evidence that is important, not the quantity, the
13 evidence which you the jury think is more likely to
14 represent a true picture of what happened.

15 How do you determine the credibility of these
16 witnesses? Again here, ladies and gentlemen, use your
17 plain, everyday common sense. How did they impress you?
18 Did you think they were testifying frankly, candidly and
19 fairly? So, again, apply your common sense and experience just
20 as you would in determining an important matter in your
21 own life when you have to decide whether you have been given
22 a true picture of a given situation.

23 I think you consider a witness' demeanor, his
24 age, background, his occupation, a witness' candor or lack
25 of it, a witness' possible bias, his means of information,

2 and the accuracy of his recollection.

3 You consider whether you find a witness'
4 testimony supported, or whether you think it is contradicted
5 by other credible witnesses or circumstances.

6 A witness may be discredited or impeached by
7 evidence if at other times he made statements which are
8 inconsistent with his present testimony, and if you believe
9 that any witness has lied to you, falsified to you, you
10 can disregard all that witness' testimony, if you want to,
11 or you can accept part of it if you find it is reliable,
12 and you can disregard the rest.

13 Now, Mr. Turner did not take the stand in
14 this case, and this must not be considered by you at all
15 as any evidence against him or any presumption or inference
16 unfavorable to him. Please don't let this weigh in the
17 slightest degree in your deliberations.

18 The reason for this is that, as I told you, the
19 Government has the burden of proving the defendant guilty
20 beyond a reasonable doubt. A defendant is not required,
21 or has no burden to prove his innocence.

22 You will seek to arrive at a verdict here
23 consistent with the conscientious convictions of each and
24 every one of you.

25 As the lawyers have stated to you, it is

1 obviously important, very important, to both the
2 Government and to Mr. Turner that this case be decided by
3 you, and this being a criminal case, your verdict must
4 be a unanimous verdict, representing the conscientious
5 convictions of every one of you.
6

7 And if you find the defendant not guilty, please
8 do not hesitate, for any reason, to render a verdict of
9 not guilty. On the other hand, if you find that the
10 defendant is guilty, you must not hesitate to render a
11 verdict of guilty because of sympathy or any other reason
12 at all. Please do not consider the possibility of punishment
13 if you find him guilty. Please don't let this enter into
14 your deliberations in any way, or allow it to make any of
15 you seek to avoid the performance of an unpleasant task.
16 The duty of imposing sentence, of course, rests exclusively
17 on the Court.

18 Finally, ladies and gentlemen, I am sure that
19 if you listen to the views of your fellow jurors, and if you
20 apply your common sense here, you will reach a fair verdict.
21 Remember, that verdict must be rendered without fear, without
22 favor, without prejudice, and without sympathy.

23 Will counsel come forward, please?

24 (At the side bar)

25 THE COURT: Mr. Thau.

MR. THAU: Your Honor, I have only one, and that is, when you asked the jury to consider whether they would have felt threatened had they heard the words.

Since we contest that the defendant uttered those words, the manner in which your Honor charged suggested --

THE COURT: I made it a contention. I think I covered that.

How about you?

MR. LEVINE: I was looking carefully. I am not sure you charged the attempt, constituting an attempt.

THE COURT: I said it is an attempt. I will repeat that if you want.

MR. LEVINE: The Government would like to get a charge that it is not required to prove that the defendant succeeded in getting any money.

THE COURT: I will tell them. I think that is fair enough. We both agreed to that.

(In open court)

THE COURT: Two things, ladies and gentlemen.

As I mentioned to you, I think, in the charge quite clearly, the defendant is charged with an attempt to rob the bank, and it is immaterial if that attempt

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gwnch

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succeeded because it is plain from the evidence that it did not. That is immaterial to your determination.

The second point is, when I talked to you about intimidation, I should have added that the Government has the burden of proving that that statement was made, that the statement was made by the defendant.

I would like to add that, too.

All right.

Miss Ehrman, you are the alternate and at this point it is my pleasure to excuse you because all your fellow jurors are here and able to go along. So you are going back to Armonk, New York.

Thank you very much for being with us.

THE CLERK: Would you report, please, back to the central jury room before you go home.

Marshal, come forward, please, and raise your right hand.

(Marshal sworn)

THE COURT: All right, ladies and gentlemen, I trust your verdict will be either guilty or not guilty.

Thank you very much.

(At 4:05 p.m., the jury retired to commence deliberation.)

REQUEST NO. 3

Element No. 2 Count One - Attempt

With respect to the second element the Government must prove that the defendant attempted to take bank money from the Bowery Savings Bank teller. The Government is not required to prove that the defendant succeeded in actually getting the money.

An attempt is an act done in part execution of an unlawful purpose and design; it is an act done with intent to commit a crime but failing to effect its commission. Preparation to commit a crime is not an attempt. The law considers as an attempt only those acts which not only tend to the commission of the crime, but which carry the project so near to its accomplishment that in all reasonable probability the crime itself would have been committed but for timely interference resulting in a failure to consummate the crime.

Taken from charge of Judge Reeves in
United States v. Coplon, aff'd, 185
F.2d 629, 633 (2d Cir. 1950).

D

CERTIFICATE OF SERVICE

June 25, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

David F. Gillis